Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

GEORGE LUIS GUTIERREZ,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. With the indictment's omission of any enhancement sentencing factors other than a quantity of marijuana, did the appeals court reversibly violate the Fifth Amendment in affirming the district court's prison sentence of 292 months and its adoption of the presentence report's finding of:

   a. criminal history category VI enhancement **for career criminal under U.S.S.G. § 4B1.1.(a)**, for this cause's indictment failed to give notice of or allege any "recidivism or prior conviction" facts for enhancement;

   b. total offense level of 35 **after making a 4 level enhancement for organizer or leader under U.S.S.G. § 3B1.1(a)**, for this cause's indictment failed to give notice of or allege any "organizer or leader" facts for enhancement; and/or

   c. total offense level of 35 **after making a 2 level enhancement for use of minor to commit crime under U.S.S.G. § 3B1.4**, for this cause's indictment failed to give notice of or allege any "use of minor" facts for enhancement?

LIST OF ALL PARTIES BELOW

At the appeals and district courts below, all the parties were the United States of America and George Luis Gutierrez.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

PETITION FOR WRIT OF CERTIORARI

Petitioner George Luis Gutierrez ("Gutierrez") prays a writ of certiorari issue.

CITATIONS TO OPINION AND ORDERS BELOW

The unpublished opinion of the court of appeals appears as U.S. v. Gutierrez. (Pet. App. 1-4). The judgments of the appeals and district courts are unpublished. (Pet. App. 20-34). For the district court and parties' sentencing colloquy, see Pet. App. 5-19.

BASIS FOR SUPREME COURT'S JURISDICTION

Petitioner seeks the Supreme Court's review of the opinion and judgment entered on direct review by the court of appeals for the fifth circuit in its cause no. 00-40394. That judgment was issued as mandate on March 22, 2001 (Pet. App. 20). On February 28, 2001, that opinion was entered (Pet. App. 1-4). No rehearing was sought.

There was no request to time extend this petition's filing.

Under 28 U.S.C. 1254(1), the Supreme Court has jurisdiction to review by writ of certiorari the judgment and opinion entered by

the court of appeals in this criminal case.

U.S. CONSTITUTION'S FIFTH AMENDMENT

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

Under 18 U.S.C. § 3231, the U.S. district court (Vela, J.) had subject matter jurisdiction when on October 19, 1999, a grand jury returned a five count indictment in cause 7:99CR00546-01 in southern district of Texas (1R 4-1). Its **count 1** charged Gutierrez and six other persons with conspiracy to possess with intent to distribute more than 1000 kilograms, that is approximately 1,540 kilograms, of marijuana, a Schedule I controlled substance in violation of 21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(A).

Under 28 U.S.C. § 1291, the U.S. court of appeals for the Fifth Circuit had jurisdiction when Gutierrez noted appeal on April 12, 2000 (1R 105; doc. 276), after oral sentencing on April 4,

2000, where the district court overruled defense's PSR objections (Pet.App. 36-44), adopted the presentence report's findings, ordered $100 assessment and sentenced to 292 months, to be followed by five years of supervised release (Pet.App. 5-19). Then on May 3, 2000, the clerk entered the district court's judgment of conviction and sentence on count 1 for conspiracy to possess with intent to distribute 1,540 kilograms of marijuana (Pet. App. 21-34). Gutierrez remains incarcerated.

REASONS FOR REVIEW

The Supreme Court should grant review, since a U.S. court of appeals has decided important questions of federal law which the Supreme Court should

a. re-review and settle as to question 1a above; and

b. review, decide and settle as to questions 1b and 1c above.

ARGUMENT (related to direct appeal issue nos. 1-5)

Appellant asks this Court to hold that in exercising discretion in choosing a sentence at or below the statutory maximum, the sentencing court not only should rely only on facts alleged in the grand jury's indictment but also is prohibited from using extra-indictment facts found initially in a PSR. Such ruling is based

within the Fifth and Sixth Amendments.

Petitioner submits that since the indictment herein did not allege any facts about organizer/leader, minor's use, or recidivism/prior convictions, applicable to Petitioner's sentencing was the underlying rationale behind the teachings but not the "narrow express holding" of Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 2362—2363, 147 L.Ed.2d 435 (2000).

The sentencing court adopted the findings in the presentence report (PSR) of total offense level at 35 with the base offense level at 32 under U.S.S.G. § 2D1.1(a)(3) with a **4 level enhancement for organizer or leader under U.S.S.G. § 3B1.1(a) and a 2 level enhancement for use of minor to commit crime under U.S.S.G. § 3B1.4** and a 3 level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1(a). The district court adopted the PSR's finding that **Petitioner is a career offender and pursuant to U.S.S.G. § 4B1.1(a), his criminal history category is a VI**, with guideline range of 292 to 365 months incarceration (PSR at 10-21). If career offender enhancement were inapplicable, the PSR determined Petitioner's criminal history category was V, with a guideline range of 262 to 320 months. Under category VI, the

lowest applicable sentence was the 292 months Petitioner was sentenced to. That difference of 30 months is important to Petitioner and society's interest in fairness given Petitioner's right to a grand jury indictment and due process under the Fifth Amendment to the U.S. Constitution.

However, when Petitioner was sentenced as a "career offender" on April 4, 2000, he, his defense counsel and the district court did not have the benefit of the opinion in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 2362-63, 147 L.Ed.2d 435 (decided June 26, 2000). Of course, Petitioner acknowledges the direct Apprendi holding does not require an appeals court to render the legal ruling Petitioner herein seeks.

But Petitioner submits the implications of the reasoning in Apprendi apply to all cases pending on direct review. See U.S. v. Nicholson, 231 F.3d 445 (CA9 2000) (citing to Griffith v. Kentucky, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987); Powell v. Nevada, 511 U.S. 79, 80, 114 S.Ct. 1280, 128 L.Ed.2d 1 (1994)).

The judge's role in sentencing is contained by the facts alleged in the indictment and found by the fact finder at the guilt phase.

Facts that expose a defendant to a punishment greater than the maximum otherwise legally prescribed were for the Sixth Amendment's framers by definition "elements" of a separate legal offense. Apprendi, 120 S.Ct. at 2359 n. 10.

After discussing it is arguable that Almendarez-Torres v. U.S., 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), was incorrectly decided, for a logical application of its reasoning in Apprendi should apply "if the recidivist issue were contested," the Supreme Court said (footnote omitted):

> In sum, our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in Jones. Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." 526 U.S., at 252-253, 119 S.Ct. 1215 (opinion of STEVENS, J.); see also id., at 253, 119 S.Ct. 1215 (opinion of SCALIA, J.).

Apprendi, 120 S.Ct. at 2362-2363.

The Supreme Court should grant Petitioner all relief sought, reverse the Fifth Circuit's opinion and judgment herein, overrule its

own "recidivism exception" to its Apprendi holding and expand the constitutional doctrine announced in Apprendi **so "only the tip of the iceberg" will be the Fifth precedent** as to defendant-appellant Beman in U.S. v. Doggett, 230 F.3d 160, 165-66 (CA5 2000), cert. denied, ___ U.S. ___, 121 S.Ct. 1152, 148 L.Ed.2d 1014 (2001), where the court said:

> b. Dunois "Dee" T. Beman
>
> Beman, as opposed to Doggett, does benefit from Apprendi. As aforementioned in the discussion of Doggett's sentence, the baseline statutory penalty for any quantity of methamphetamine is in § 841(b)(1)(C). This subsection provides for an increase in the statutory penalty for individuals, such as Beman, who have a prior felony conviction. Since the Supreme Court in Apprendi did not overrule its decision in Almendarez-Torres, the sentencing court did not err by using Beman's prior convictions to enhance his sentence, even though the prior convictions were not submitted to the jury. See Apprendi, 120 S.Ct. at 2362-63; Almendarez-Torres v. United States, 523 U.S. 224, 230, 140 L. Ed. 2d 350, 118 S.Ct. 1219 (1998). Nevertheless, even considering the proper enhancement, the maximum penalty for Beman under § 841(b)(1)(C) is 30 years on each count. Because the district court sentenced Beman to two concurrent life sentences, we remand Beman's case for resentencing consistent with this opinion.[3]

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[3] Similar to Doggett, Beman's base offense level was calculated at 34. Beman received a three-level enhancement because of his two prior felony controlled substance convictions, for a total offense level of 37. Pursuant to U.S.S.G. § 4B1.1, Beman is a career offender and his Criminal History Category must be VI. Given these findings, the Guidelines' Sentencing Table proscribes a range of 360 (continued...)

PRAYER

Petitioner requests the Supreme Court to agree with his above arguments and remand this cause for re-sentencing without any application of U.S.S.G. §§ 4B1.1(a), 3B1.1(a), or 3B1.4, for this cause's indictment failed to give the notice requisite to enable the district court to use any of those enhancement factors at sentencing.

Respectfully submitted and signed on May 29, 2001, by

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[3](...continued)
months to life imprisonment. U.S.S.G. § 5A. Because Apprendi does not affect a judge's ability to determine the quantity of drugs in formulating the appropriate sentencing range under the Guidelines, the range of 360 months to life is still applicable on remand. However, as discussed in the body of the opinion, the sentencing judge is limited, in that the jury did not find a quantity of drugs, to a maximum sentence of 30 years on each count.